PATENTS AND INDUSTRIAL PROGRESS.

BY WILLIAM MACOMBER.

ONE Federal department practically runs itself, pays its own bills and builds up a surplus. That department is the Patent Office. It is nearly forty years since the Patent Statute, substantially as it stands to-day, was framed. Remarkable judgment attended the framing of an act which has met the varying and increasing demands of an age of progress those legislators could not have foreseen. So perfectly has this system worked, so largely has it contributed to our industrial welfare, that it is looked upon as dependable as season, seed-time and harvest. It is almost impossible to get Congress to pay any attention to it even for small needs, for it is taken for granted that the Patent Office will go on without legislative tinkering.

Another significant fact is that our patent system is the best in the world. Its fundamental, distinguishing feature is that a patent should be granted only after rigid examination establishing the fact of true novelty and limiting the patent to a clear, sharp claim-statement of that in which such novelty resides. The patentee must not only distinguish his invention from that which is old, but he must mark the limit of his discovery in order to leave the door for improvement wide open. So valuable is this fundamental provision, it is not uncommon for foreign inventors to make application in the United States in order to determine the actual novelty of their inventions.

It may be set down at once that our patent system is sound, that change should be made only as exigency and experience dictate, and then only at the hands of experts and statesmen. But because the system is sound and should be altered only with care, it does not follow that its efficiency is what it should be. A locomotive does not need rebuilding because it lacks fuel. It

is no credit to Congress that with a one-hundred-per-cent. system and a fifty-per-cent. supply of facilities our commissioners of patents have been able to get seventy-five-per-cent. results. In spite of the increased skill and efficiency of the examiners, the enormous increase in the number of applications and the constantly increasing complexity and refinement of invention have rendered it impossible to maintain a proper standard of efficiency. The result has been, not a lowering of the original standard, but *a failure to advance the standard of thoroughness in any degree commensurate with the standards of manufacturing and engineering skill.* This leads directly to a statement of the two demands which our industrial and scientific interests make upon our patent system.

1. The grant of a patent should afford substantial ground for assuming that the thing patented is novel and that the patent is valid.

2. The means for determining the novelty and validity of a patent—the final, judicial determination of these questions—should be certain, speedy and inexpensive.

The reasonableness of these demands should be self-evident, but their importance is sadly overlooked. Nothing is plainer than that industrial activity must have peace, quiet, certainty. We learned long ago that business will adjust itself to almost any condition so long as that condition is fixed, settled, undisturbed. We have reached the point where, owing to the inability of the Patent Office to make the necessary examination, patents carry upon their face very little guaranty of novelty or stability. This condition is remediable by the establishment of proper and readily attainable efficiency in the Patent Office.

Only one thing is needful to meet this first pressing demand: *increase the Patent Office plant and force.* The earnings of the Patent Office for 1908 were $1,896,847.67. The total expenses were $1,712,303.48. This leaves net earnings of $184,544.25, which, added to the earnings of previous years, swells the surplus to the enormous sum of $6,890,725.89. These earnings not only cannot be put to use by the Patent Office, *but do not even draw interest that may be used.* This surplus alone would erect and equip an efficient plant for the department without a cent of cost to the Government. The net earnings each year would pay the cost of the needed increase in working force.

Moreover, this income may be nearly doubled by a proper revision of the schedule of fees without burden to the patentee. When an applicant files his papers he pays but fifteen dollars. When his application is allowed he pays a final fee of twenty dollars. Suppose we *reverse* these fees. In 1908 there were 27,759 more applications made than matured into patents; reversing these fees would have added $138,795 to the income of the department without adding a cent of cost to any patent actually issued. If Congress would co-operate with the Patent Office officials that department might be made *thoroughly efficient without the increase of appropriation or cost of a patent.* Let it not be supposed such common-sense course has not been urged. Every commissioner has urged it in some form, but Congress will give attention only when the industries of the country enforce it.

Coming now to the second demand, namely, that there should be certain, speedy and inexpensive means for determining the validity of a patent by the courts, a brief review of present methods and conditions must be had. The prevailing method is by action in equity. When the cause is at issue the taking of testimony begins—not in court, but here and there, all over the country, before notaries. The testimony is laboriously written out on the typewriter. We go wherever a witness happens to reside. Everything goes into the record; there is no one to rule on the evidence. As an illustration of the tramping that is done, I cite a case within my own experience. Testimony was taken in Detroit, Buffalo, Detroit, Los Angeles, Chicago, Detroit, Troy, Buffalo, Chicago, Schenectady and Detroit, in the order given. This is common.

From one to three years may complete a record seldom containing less than five hundred pages and sometimes assuming the proportions of the automobile cases, recently decided, which made a record of *thirty-six large octavo volumes.* Years may elapse before argument and decision. Then comes the appeal, reprinting the record and briefs, and in time an opinion is handed down. The cost now may be $5,000 or $50,000. Is this final? Oh no; this merely gives the patentee, if he succeeds, the right to enjoin the infringment that may have continued all these years and to prove damages *if he can.* But can he? The equity docket in New York, as a fair average, discloses only four cases of substantial recovery out of fifty-four cases where accountings were

decreed.* The case of Eastman *vs.* Mayor, etc.,† was begun in 1877; decree for an accounting was ordered in 1891; accounting was completed and judgment for $818,074.32 was ordered in 1897. In 1904—twenty-seven years after he began his suit and seven years after he had been awarded an enormous fortune—the patentee was finally defeated and mulcted with costs. Nor is it the patentee alone who suffers. Six patents were the foundation of a successful hay-press industry.‡ After much hard fighting, the company had four of its patents held valid and infringed at the hands of an Appellate Court. Within a year, on rehearing, this court reversed itself and held all of the patents void but one. It took seven years to complete that accounting, and, owing to the fact that five-sixths of the patents had been held void, the company was unable to segregate the damages attributable to the single patent still good, and the result was six cents damages and half the costs. The case of Tuttle *vs.* Claflin§ was in the courts eighteen years, survived two masters, was nine years in the accounting and finally ended in a lump-sum award by the Appellate Court.

A mere recital of such facts is enough to show that the second demand of the industrial world is wholly unsatisfied; and that, as a matter of fact, adjudication of a patent is put at a premium few can pay. Moreover, what chance has an ordinary inventor in maintaining his rights as against a wealthy infringer? He cannot get capital to back him; men do not buy lawsuits. In order to make large economic use of the patent monopoly, a manufacturing concern must control the main patents in the art, must retain expensive patent counsel and patent experts and must set aside a large sum to defray the expenses of litigation. In order to protect his rights and establish the validity of his patent an inventor must have large means and much time at his command, else his patent is nothing short of a curse to him.

These criticisms of the prolix and expensive methods of conducting patent causes apply with even greater force to the analogous methods in interference cases. It is a notorious fact that, if a powerful concern employing a patent monopoly can succeed in raising an interference in the Patent Office with an impecuni-

* Fixed Law of Patents, Section 826.
† 134 Fed. Rep., 844.
‡ 127 Fed. Rep., 363.
§ 76 Fed. Rep., 227.

ous applicant, the end is in sight. By dilatory and obstructive proceedings, readily instituted by an attorney skilled in the technical practice in interference cases, by tramping from one end of the land to the other taking testimony and then by numerous motions and appeals, an ordinary inventor stands no more chance in such a contest than he would in attempting to compete industrially with such a concern.

Bad as this is, it is far from the worst. In 1891 the United States Circuit Courts of Appeals were established—one in each of the nine circuits—and these courts were given final appellate jurisdiction of patent causes. A decision of any one of these nine Circuit Courts of Appeals is final in a patent cause for that particular patent on the particular facts presented in that particular circuit, but it is *not a final adjudication upon that patent as to any other circuit.* While there is supposed to be comity between Appellate Courts, as a matter of fact there is none. The rubber-tire case and the bottle-stopper case settle that question.

Now let us take a noted case and see how it works out. Eldred owned the patent on an electric cigar-lighter. Kessler infringed the patent and Eldred sued him in the district of Indiana. The court held the patent void, so that Kessler could make, use and sell Eldred lighters anywhere in the Seventh Circuit. Kirkland was another infringer of Eldred's patent and Eldred sued him in the Western District of New York. On appeal the Circuit Court of Appeals for the Second Circuit held the patent valid and infringed;* so Eldred's patent was good in the Second Circuit, but void in the Seventh Circuit. Then Eldred sued Breitweiser, another infringer in the Second Circuit who was buying his lighters of Kessler. Kessler then brought action against Eldred to restrain him from prosecuting Breitweiser or any one buying Kessler lighters. This case went to the Supreme Court,† and that court held that as a court had once held Eldred's patent void as between him and Kessler, Kessler could make his lighters and sell them anywhere he pleased. Behold the situation! Here is a patent void in the Seventh Circuit, absolutely and finally valid in the Second Circuit as against any one except Kessler, void as against Kessler in the other circuits and valid or void as against any one else in any of the other seven circuits as one

* Eldred *vs.* Kirkland, 130 Fed., 342.
† Kessler *vs.* Eldred, 206 U. S., 285.

court after another might hold one way or the other. If I make an Eldred lighter in New York and he can catch me in that State, he can restrain me by injunction and mulct me in damages; but if, after I have made the lighter and before he can sue me I move into his own State, I have a perfect defence! This is not an isolated case. The Grant Rubber Tire patent is in a similar condition.*

It is perfectly clear that the framers of the Circuit Court of Appeals Act never anticipated such a state of affairs, and that what was intended to be desirable relief in patent litigation has turned out to be a breeder of chaos.

The situation may be summed up generally thus: The face value of a patent has depreciated by reason of the failure of Congress to legislate as urged year after year by the commissioners to keep the Patent Office abreast of the times. The practice and procedure in patent causes is so cumbersome and slow and so expensive as to render the judicial establishment of a patent a luxury wholly beyond all but the few. This is creating a monopoly founded, not upon inventive genius, but upon financial power to dominate the field. The system of trying out interferences is even worse. The Circuit Court of Appeals Act as related to patent litigation breeds nothing but chaos, and not infrequently cancels rather than establishes the value of a patent. While it may not be said, perhaps, that the act making the decision of a Circuit Court of Appeals final and unappealable in a patent cause is unconstitutional, it is unquestionable that, in view of the provision of the Constitution relating to patents and the organic law which has been builded thereon with the evolution of the nation, that act is as repugnant to the spirit of the Constitution and as subversive of our institutions founded in time and experience as the secession of a State. To destroy the value of a grant sanctioned by the Constitution, issued under the statute and sealed by the Government by creating nine courts with the power to at any time cancel the grant in one part of the United States and hold it valid and impregnable in another is a monstrosity that shocks any sane mind.

Turning now to the remedies to meet the first demand—that the grant of a patent should afford a substantial foundation for assuming the thing patented to be novel—all that is necessary is

* Consolidated *vs.* Diamond, 157 Fed., 677.

to give to the Commissioner of Patents the power any board of directors would concede to a successful president or superintendent of a corporation. All that is needed is:

1. To allow the commissioner to use the surplus the Patent Office has earned to erect and equip a plant adequate to the needs of the business.

2. To co-operate with him in a revision of the fee schedule to materially increase the revenues without additional cost to the patentee.

3. To allow him to use the earnings of his department to make the work efficient.

Absolutely no increase of appropriation is needed. Some foolish expenditures required by statute may be cut off to great advantage, but the system may be left substantially unchanged in its general workings and the cost of a patent in no way increased.

The absurd judicial arrangement of charging the Patent Office with the trial of that which is nothing less than a lawsuit should be changed. When a condition arises where there is a contest between two parties in the form of an interference, where evidence must be adduced and a decision upon the facts and the law made, it becomes subject-matter for a court and not for a governmental department. The moment issue is joined the entire controversy should be transferred to the Patent Court as hereafter outlined. It is then a litigation and should be so treated.

And in making this change the system of appeals in the Patent Office should be changed. At present we have the curious condition of an appeal from an examiner to the examiners-in-chief, a court of three members; thence to the commissioner in person, a court of one; thence to the Appellate Court of the District of Columbia, a court of three members. It is perfectly clear there should be but one appeal within the Patent Office, and that a tribunal should be created having the commissioner as presiding judge, and of such number as to be able to hear ordinary appeals without the presence of the commissioner, and with provision for ordering a full bench in important cases. The necessity of this reform has been most forcefully presented by Commissioner Moore in his annual report to Congress.

We now come to the problem most difficult of solution—meeting the second demand, that the means for determining the

novelty and validity of a patent, the final judicial determination, shall be certain, speedy and inexpensive. This demand can be met in no way but by the establishment of a Patent Court. At present an action for infringement may be brought in any one of the eighty-eight districts and be heard in the first instance by any one of the 118 circuit and district judges. On appeal the case may be reviewed by any two circuit judges sitting (two being a quorum) or even by a circuit judge and a district judge sitting as a Circuit Court of Appeal. A few of the circuit judges are excellent patent lawyers; a much smaller number of district judges are capable of mastering a patent cause. If any one doubts this, let him cite decisions without discrimination of court or judge. A court often expresses itself by a profound, judicial silence.

The first step toward meeting this second demand of our industrial interests is, then, the establishment of a Patent Court for hearing patent causes in the first instance. It should consist of nine judges, one in each of the nine circuits, whose duty it should be to *hear, try and determine such causes, having the evidence adduced before them subject to ruling and exception,* after the manner of State courts of equity. The present system of taking testimony hither and yon before notaries should be abolished. In cases where witnesses are remote, commission should issue to the patent judge of the circuit wherein the witness resides; but such commission should issue only upon proof of the materiality of the evidence sought and in no case for the taking of expert testimony. Moreover, the present practice of adducing endless expert evidence should be stopped. Ordinarily one expert on each side is enough.

Interference cases should be sent to the patent judge of the circuit most centrally located with reference to the evidence to be adduced and then and there decided in the same manner as a patent cause, but with additional safeguard that such trial shall be held behind closed doors to prevent disclosure of unpatented inventions.

The next step is the establishment at Washington of a Court of Patent Appeals. To this one central court every appeal from every patent judge should be taken and that court should be given final appellate jurisdiction. It should be composed of five judges, all of them trained in the patent law. The method of

appeal should be by case and exceptions; the record made by counsel and settled before the patent judge who heard the case, to the end that the present enormous cost of printing may be reduced and that the Appellate Court may not be burdened with a padded and cumbersome record.

Such a change in no wise disturbs the great body of case law relating to patents. It is a *change of jurisdiction, but not of system.* The great body of rules, both in law and in equity, would remain in force, *with the exception that the present conflict and chaos of law and rule would be eliminated entirely.*

What would be the gain? First, the reduction of time and cost in finally determining the economic value of a patent would be reduced to the minimum. Second, the patentee would be *given a square deal*—the thing he is now denied. Third, uniformity of law and practice—the thing that does not now exist.

The overloading of the Patent Office, the present judicial chaos and other similar conditions must force a change. The change should give a patent the potential value it now has not—a value that will entitle the owner to the right, on showing infringement, of having his patent respected at once. It should secure means for summary, inexpensive and final adjudication, not for one circuit, but for the entire country. The enormous output of paper patents should be stopped and meritorious inventors given a chance to reap due reward. The manufacturer should be able to conduct his business in peace and quiet, and not have to be on a war footing with a standing army of patent lawyers and experts and a fund for their maintenance. Thus the public in general—the entire industrial world—would gain one more assurance in these troublous times that it need not sit on the sharp edge of apprehension.

Publicity brings interest; knowledge brings reform. The facts here outlined should be investigated and demand for reform made by all industrial associations both of capital and labor. The press should educate the public both as to facts and needs. Experienced lawyers should make their views known and bar associations should memorialize Congress. And, above all, the Supreme Court should revise the equity rules to accord with imperative demand for reform.

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